Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE AGUILAR ESPINOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

DID THE FIFTH CIRCUIT ERR IN HOLDING (CONTRARY TO THE NINTH CIRCUIT) THAT 18 U.S.C. § 876 DOES NOT REQUIRE SPECIFIC INTENT TO THREATEN?

INTERESTED PARTIES

The interested parties are Jessie Aguilar Espinoza, petitioner, and the United States of America, respondent.

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I. OPINIONS BELOW

The February 20, 2003, opinion of the Fifth Circuit Court of Appeals is unreported. *See* Appendix, Exhibit ("Ex.") A. The February 1, 2002, opinion of the district court is unreported. *See* Ex. B.

II. JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

III. STATUTORY PROVISION INVOLVED

18 U.S.C. § 876 provides:

> Whosoever knowingly so deposits or causes to be delivered as aforesaid, any communications with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

IV. STATEMENT OF THE CASE

In this petition, Mr. Jessie Aguilar Espinoza asks the Court resolve a split among the circuits in interpreting an

important federal statute by correcting the Fifth Circuit's statutory interpretation which led to his prison term.

On January 1, 2001, Mr. Espinoza was charged with violating 18 U.S.C. § 876 (mailing threatening communications). Mr. Espinoza motioned to dismiss the charge because the indictment does not plead that Mr. Espinoza intended to threaten anyone (i.e., the indictment did not allege specific intent) and the Ninth Circuit has previously held that such a pleading is required under the statute. The district court denied Mr. Espinoza's motion. After Mr. Espinoza pled guilty, he was sentenced to 46 months of imprisonment. (*See* Ex. C.)

Mr. Espinoza's subsequent appeal to the Fifth Circuit on the motion to dismiss was denied in direct contradiction to the Ninth Circuit's prior holding. Now, Mr. Espinoza comes before the U.S. Supreme Court to ask that the certiorari be granted so that the Court may resolve the split among the circuits and rule that the plain language of § 876, not the

Fifth Circuit's erroneous interpretation of that statute, governs.

V. REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONTRADICTORY INTERPREPETATIONS OF 18 U.S.C. § 876 AMONG CIRCUIT COURTS

Under a number of federal statutes, including 18 U.S.C. § 876 at issue here, it is a crime to deliver threats. However, the circuit courts are split on whether or not these statutes require proof of "specific intent" to threaten or merely proof of "general intent."

The Ninth Circuit has squarely held that proof of "specific intent to threaten is required under § 876...." *See United States v. King*, 122 F.3d 808, 811 (9th Cir. 1997). In contrast, the Fifth Circuit, in the instant case, held that violation of the same statute is "a general intent crime" and does **not** require proof of specific intent. *See* Ex. A; *see also United States v. DeShazo*, 565 F.2d 893, 894-95 (5th Cir.

1978) (holding that 18 U.S.C. § 876 does not require intent to threaten). In other words, the Fifth Circuit held here that Mr. Espinoza could be convicted under § 876 even where the government did not plead that he intended to threaten anyone.

Additionally, the Eleventh Circuit has also ruled, contrary to the Ninth Circuit, that 18 U.S.C. § 876 is a general intent crime. *See United States v. Costello*, 760 F.2d 1123, 1127-28 (11th Cir. 1985) (§ 876).

The circuit split has led to an unjust situation where Mr. Espinoza now faces nearly four years in prison under Fifth Circuit law even though he would be free of these charges had the Ninth Circuit heard his case. Under these circumstances, this Court's resolution of the circuit split is critical. *See, e.g., Richardson v. United States*, 526 U.S. 813, 816 (1999) (granting certiorari where the Court recognized a split among the circuits in interpreting a criminal statute).

B. THE FIFTH CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 876 IS INCORRECT

1. The Plain Language of the Statute Requires that the Threat be Made "Knowingly"

The plain language of 18 U.S.C. § 876 requires that a person must "knowingly" deliver "communications … containing a threat" to another. A person certainly cannot "know" they are delivering a threat without also intending that the communication actually be a threat.

The best definition of "knowingly" in the context of criminal statute comes from § 2.02 of the Model Penal Code which states that "[a] person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist…." Under the Model Penal Code definition, a person cannot "knowingly" deliver a threatening communication unless they are aware that

"circumstances exist" such that the communication is threatening. Without that person specifically intending that the communication be threatening, how could they possibly be aware it is threatening?

Yet the Fifth Circuit's statutory interpretation erases the "knowingly" requirement by holding that 18 U.S.C. § 876 does not require any specific intent to threaten. Indeed, in this respect, the instant case is different from the Fifth Circuit's *en banc* holding in *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997), since *Myers* held that 18 U.S.C. § 875(c) does not require specific intent, but Congress did **not** include any "knowingly" requirement in that statute.

The Ninth circuit has acknowledged that when Congress uses the word "knowingly" the language normally adds a subjective element to the crime. *See U.S. v. Twine*, 852 F.2d 676, 680-81 (9th Cir. 1988). Indeed, if Congress did not want intent to threaten to be an element of § 876, it could have omitted the word knowingly just as it did with respect to

18 U.S.C. § 875(c). Here, the Court should follow the Ninth Circuit's plain language reading of § 876 rather than the interpretation offered by the Fifth and Eleventh circuits. *See, e.g., United States v. Menasche*, 348 U.S. 528, 539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotes omitted).

2. The Fifth Circuit's Interpretation is so Overbroad it Would, if Adopted, Render the Statute Unconstitutional

Under the Fifth Circuit's reasoning, a person can be convicted under § 876 for mailing a communication even if that person does not intend that the communication be a threat. This interpretation should be rejected because it would render § 876 unconstitutionally broad both on its face and as applied here for at least two reasons. *See, e.g., Branch v. Smith*, 123 S.Ct. 1429, 1441 (2003) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result").

First, Congress has no authority to pass a law that broadly makes delivery of communications a crime even where no one intends the communications to be threatening. This Court has previously ruled that the U.S. Constitution's Commerce Clause cannot justify Congressional attempts to punish gender-motivated crimes of violence and possession of firearms in a school-zone. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In each instance, this Court found that the activity Congress attempted to punish properly fell within the states' sphere of influence and that the punished activity was not economic activity. Certainly, if § 876 is interpreted so that it punishes intrastate communication even where that communication is not intended as a threat, § 876 would also be unconstitutional under this reasoning.

Indeed, the particular application of the Fifth Circuit's version of § 876 in the present case is especially troubling since Mr. Espinoza's alleged conduct (mailing a threatening

letter from within Texas to a Texas recipient) occurred entirely within the state of Texas. The Fifth Circuit's holding here that an individual communicating within a single state without the intention of threatening might violate federal law would make § 876 unconstitutionally broad.

Second, the Fifth Circuit's interpretation of § 876 should be avoided because it would render § 876 unconstitutional under the First Amendment of the United States Constitution. Certainly, the First Amendment does not give anyone a right to intentionally threaten others. *See Watts v. United States*, 394 U.S. 705, 707 (1969). However, as this Court acknowledged in *Watts*, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Here, under the Fifth Circuit's interpretation, § 876 makes speech illegal even if the speaker does not intend it to be a threat. Under this interpretation, a person can never know whether or not a communication might violate § 876. This interpretation cannot help but to have a chilling effect on

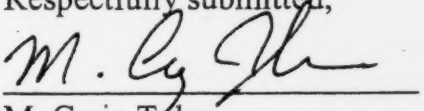
speech contrary to the language and longstanding principles of the First Amendment.

Since the Fifth Circuit's interpretation of § 876 would render the statute unconstitutional for the two reasons above, this Court should avoid that overly broad interpretation. Adoption of the Ninth Circuit's specific intent requirement for § 876 is narrowing yet also consistent to the statute's plain language. This Court should grant certiorari to correct the Fifth Circuit's error and promulgate an interpretive constitutional standard for § 876 that is consistent with the statute's language and is the same for every circuit.

VI. CONCLUSION

As a result of the Fifth Circuit's erroneous interpretation of 18 U.S.C. § 876, Mr. Espinoza now faces nearly four years imprisonment – a punishment he would not have faced under Ninth Circuit law. The Court should grant certiorari to correct the Fifth Circuit's error and to set forth one consistent standard for future prosecutions under § 876.

Respectfully submitted,



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Dated: May 21, 2003

APPENDIX

EXHIBIT A

United States Courts
Southern District of Texas
ENTERED
FEB 01 2002
Michael N. Milby
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

Cr. No. H-01-832-5

v.

JESSE AGUILAR ESPINOZA

ORDER

The defendant's motion to dismiss the superseding indictment is denied. It is so ordered.

Signed on this 1st day of February, 2002, at Houston, Texas.

s/Kenneth Hoyt
UNITED STATES DISTRICT JUDGE

EXHIBIT B

U.S. COURT OF APPEALS
FILED
FEB 20 2003
CHARLES R. FULBRUGE III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20474
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSIE AGUILAR ESPINOZA,

Defendant-Appellant.

- - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CR-832-1

- - - - - - - - - -

Before WIENER, EMILIO M. GARZA, and CLEMENT,

Circuit Judges.

PER CURIAM:*

Jessie Aguilar Espinoza appeals from a guilty-plea conviction for one count of mailing threatening communications in violation of 18 U.S.C. § 876. Espinoza argues that specific intent is an element of an offense under 18 U.S.C. § 876 that must be alleged in the indictment. Espinoza concedes that his argument is foreclosed by this circuit's law but seeks to preserve the issue for Supreme Court review. In United States v. DeShazo, 565 F.2d 893, 894-95 (5th Cir. 1978), this court held that an offense pursuant to 18 U.S.C. § 876 was a general intent crime. Accordingly, Espinoza's argument is foreclosed. The judgment is AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

EXHIBIT C

United States Courts
Southern District of Texas
ENTERED
APR 26 2002
Michael N. Milby
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston

UNITED STATES OF AMERICA

v.

JESSE AGUILAR ESPINOZA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:01CR00832-001

Brent Newton, AFPD
Defendant's Attorney

THE DEFENDANT:

Pleaded guilty to count(s) 1S on February 4, 2002.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 876	Mailing threatening communications	10/22/2001	1S

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 454-82-2374

Defendant's Date of Birth: 02/10/1949

Defendant's USM No.: 13719-179

Defendant's Residence Address:
234 Garrortsville
Houston, TX 77022

Defendant's Mailing Address:
234 Garrortsville
Houston, TX 77022

April 22, 2002
Date of Imposition of Judgment

s/Kenneth M. Hoyt
Signature of Judicial Officer

KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

4/25/02
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 46.

This term consists of FORTY-SIX (46) MONTHS as to Count 1S. This term of imprisonment is ordered to run consecutive to the defendant's undischarged term of imprisonment he is presently serving as a result of his conviction in Harris County, Texas, under Cause Number 890155.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

This term consists of THREE (3) YEARS as to County 1S.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

See Additional Mandatory Conditions Sheet

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth

below). The defendant shall also comply with the additional conditions on the attached page.

STARDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall not permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as a informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

ADDITIONAL MANDATORY CONDITIONS

The defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample

is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addition, dependency or abuse which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the Program Director with the approval of the probation officer. The defendant shall further submit to drug-detection techniques, in addition to those performed by the treatment agency, as directed by the probation officer. The defendant will incur costs associated with such drug/alcohol detection and treatment, based on ability to pay as determined by the probation officer.

The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such a program, based on ability to pay as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
TOTALS	$100.00

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of $100 due immediately, balance due in accordance with E below:

E. Special instructions regarding the payment of criminal monetary penalties:

Make all payment payable to: U.S. District Clerk, Attn: Finance, P. O. Box 61010, Houston, TX 77208

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payment previously made toward any criminal monetary penalties imposed.